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8 **UNITED STATES DISTRICT COURT**
9 **THE NORTHERN DISTRICT OF CALIFORNIA**
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Case No. 15-cv-01824-BLF

11 ROBERT HEATH, and
12 CHERYL FILLEKES,
Plaintiffs, on behalf of themselves and
13 others similarly situated,

14 Plaintiffs,

15 v.

16 GOOGLE INC., a Delaware
corporation,

17 Defendant.
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**REPLY MEMORANDUM IN
SUPPORT OF DANIEL LOW'S
MOTION TO WITHDRAW AS
COUNSEL OF RECORD FOR
PLAINTIFF ROBERT HEATH**

Date: February 18, 2016
Time: 9:00 a.m.
Location: Courtroom 3, 5th Floor,
San Jose

Complaint Filed: April 22, 2015
Trial Date: May 1, 2017

**REPLY MEMORANDUM IN SUPPORT OF DANIEL LOW’S MOTION TO
WITHDRAW AS COUNSEL OF RECORD FOR PLAINTIFF ROBERT
HEATH**

Pursuant to Civil Local Rules 5-1(c)(2)(E), 7-3, and 11-5, Daniel Low on behalf of Kotchen & Low LLP (“Movant”) hereby files this reply brief in support of his motion to withdraw as counsel of record for Plaintiff Robert Heath (“Mr. Heath”).

On January 22, 2016, Daniel Low moved to withdraw as counsel of record for Plaintiff Robert Heath. Mot. to Withdraw (Dkt. #42). At that time, Mr. Heath was seeking alternate counsel, but had not yet secured counsel. *Id.* at 4. On February 4, 2016, Dow Patten, of the firm Smith Patten, entered an appearance on behalf of Mr. Heath. Notice of Appearance (Dkt. #46). On February 5, 2016, Mr. Patten, on behalf of Mr. Heath, filed a statement of non-opposition to Mr. Low’s motion to withdraw. Pl. Heath’s Statement of Non-Opposition (Dkt. #49). The same day, Defendant Google, Inc. (“Google”) filed a response to Mr. Low’s motion to withdraw, raising four concerns. Def.’s Resp. to Mot. to Withdraw (Dkt. #50).

First, Google was concerned regarding the service of process on Mr. Heath. *Id.* at 1. The appearance of Mr. Patten for Mr. Heath moots this concern.

Second, Google indicated that it was concerned with scheduling, given the March 11 conditional certification briefing deadline. *Id.* Google’s concerns arose in

1 relation to the scheduling of Mr. Heath's deposition. Movant understands that
2 Google and Mr. Heath have recently agreed to a date in early March for Mr. Heath's
3 deposition.
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5 Nevertheless, Movant believes the case schedule will need to be modified. As
6 Plaintiffs indicated in their Motion to Extend Scheduling Order Deadlines, Google
7 has lodged objections to all of Plaintiffs' document requests and single interrogatory,
8 and has refused to provide the vast majority of responsive documents and
9 information. Pls.' Mot. to Extend Scheduling Order Deadlines at 2 (Dkt. #39). As
10 Plaintiffs explained, Google's discovery practices had necessitated a 30(b)(6)
11 deposition just to determine what responsive materials Google possessed. *Id.* at 4-5.
12 Plaintiffs noticed that deposition on December 4, 2015, and later served an amended,
13 narrower notice on January 14, 2016, in response to Google's objections with the
14 scope of Plaintiffs' first notice. *See* Am. Rule 30(b)(6) Dep. Notice (Ex. 1). In
15 addition to addressing discovery matters, Plaintiffs' amended 30(b)(6) deposition
16 notice requested that Google designate a witness to testify concerning Google's
17 hiring procedures for technical positions, including its use of hiring committees, as
18 well as government investigations into age discrimination at Google. *Id.* Google has
19 objected to this notice, and has refused to provide a witness to address any topic
20 other than its hiring procedures for the specific positions to which the Plaintiffs
21 applied. *See* Letter from T. McInerney to D. Kotchen (Feb. 3, 2016) (Ex. 2).
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1 Google's refusal to produce documents responsive to Plaintiffs' document requests,
2 refusal to provide a substantive response to Plaintiffs' interrogatory, and refusal to
3 designate a witness to fully address Plaintiffs' noticed 30(b)(6) deposition topics are
4 the subject of several forthcoming Joint Discovery Reports that the parties will
5 submit next week.
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8 While the evidentiary requirements on conditional certification are low, *see*,
9 *e.g. Benedict v. HP Co.*, No. 13-CV-119-LHK, 2014 WL 587135, at *5 (N.D. Cal.
10 Feb. 13, 2014) (noting that "[f]or conditional certification at the notice-stage, courts
11 require little more than substantial allegations") (citations omitted), Plaintiffs believe
12 they will be significantly prejudiced if required to move for conditional certification
13 without obtaining even basic collective action discovery, such as deposition
14 testimony concerning Google's hiring procedures for all members of the putative
15 collective action. After conferring with both counsel for Google and Mr. Patten,
16 Movant is hopeful that the parties can reach agreement on an extension to the
17 schedule, and intends to file either a stipulation, or, if necessary, a motion to extend
18 the conditional certification briefing schedule until after more discovery has been
19 conducted.
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24 Third, Google raised the issue of lead counsel. Def.'s Resp. to Mot. to
25 Withdraw at 1-2 (Dkt. #50). Mr. Patten has stipulated that Kotchen & Low will serve
26 as lead counsel. However, it is possible that Mr. Heath and Ms. Fillekes will seek to
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1 certify different classes. In that case, Mr. Patten will serve as counsel for Mr. Heath's
2 class, and Kotchen & Low (and its co-counsel) will serve as counsel for Ms.
3 Fillekes' class.
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5 Fourth, Google sought clarification concerning whether only Mr. Low was
6 withdrawing his representation of Mr. Heath, or whether all attorneys of the firm
7 Kotchen & Low were withdrawing. *Id.* at 2. To clarify, all attorneys of Kotchen &
8 Low, as well as their co-counsel in this matter, Michael F. Brown of DVG Law
9 Partner LLC, and Vonda K. Vandaveer, are withdrawing their representation of Mr.
10 Heath.
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13 For the foregoing reasons, and for the reasons stated in Movant's opening
14 brief, Movant respectfully requests that the Court issue an order pursuant to Local
15 Rules 5-1(c)(2)(E) and 11-5, and substitute Mr. Patten, of Smith Patten, as Mr.
16 Heath's counsel of record.
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1 Dated: February 12, 2016

Respectfully submitted,

2 By: /s/Daniel Low

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